

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN LEE WILCOX,

Defendant-Appellant.

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UNPUBLISHED

May 22, 2007

No. 267944

St. Joseph Circuit Court

LC No. 04-012448-FC

Before: Cooper, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Defendant appeals as of right from a jury conviction of first-degree criminal sexual conduct, MCL 750.520b(1)(a), for which he was sentenced to 6 ½ to 20 years in prison. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first contends that the trial court erred in admitting evidence that he possessed pornography.<sup>1</sup>

The trial court's ruling regarding the admission of evidence is reviewed for an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). An abuse of discretion occurs if the trial court's decision is outside the range of principled outcomes. *People v Carnicom*, 272 Mich App 614, 616-617; 727 NW2d 399 (2006).

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403. Unfair prejudice means more than just damage to a defendant's case. *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995). Evidence presents the danger of unfair prejudice when it threatens accuracy and fairness in that it would lead the jury to conclude that the evidence "is more probative of a fact than it actually is" or to decide the case on an improper basis such as emotion. *Id.*; *People v Meadows*, 175 Mich App 355, 361; 437 NW2d 405 (1989).

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<sup>1</sup> While defendant frames the issue as a constitutional one involving his due process rights, the crux of his argument is that the evidence should have been excluded under MRE 403 as substantially more unfairly prejudicial than probative.

Evidence that defendant had pornographic images of naked women and children was relevant because it corroborated the victim's testimony that she had seen such images on defendant's computer and thus enhanced her credibility, as the prosecutor argued. Further, while the victim had not testified to seeing each particular image that was described by the officers, all the images came within the category of "grown-up movies" (adult entertainment) as opposed to family fare. The victim described encounters with defendant in which he showed her movies of naked women, and she testified that she also observed images of children and little girls. Because the evidence was highly probative of the victim's credibility and did not seek to have the jury draw an improper inference of guilt from character, it was not unfairly prejudicial. To the extent that some of the descriptive testimony relative to the images may have been unfairly prejudicial, the probative value of the evidence was not *substantially* outweighed by the danger of any unfair prejudice. Giving the trial court the required deference, we hold that the court did not abuse its discretion in allowing the evidence.

Defendant next contends that trial counsel was ineffective because he did not object to testimony that defendant was initially silent when confronted with the accusations against him. Because defendant failed to raise this claim below in a motion for a new trial or an evidentiary hearing, review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance was objectively unreasonable and the representation was so prejudicial that he was deprived of a fair trial. To demonstrate prejudice, the defendant must show that, but for counsel's error, there was a reasonable probability that the result of the proceedings would have been different. This Court presumes that counsel's conduct fell within a wide range of reasonable professional assistance, and the defendant bears a heavy burden to overcome this presumption. [*People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001), *aff'd* 468 Mich 233 (2003) (citations omitted).]

A defendant's post-*Miranda*<sup>2</sup> silence generally cannot be used against him at trial. *People v Rice (On Remand)*, 235 Mich App 429, 435-436; 597 NW2d 843 (1999). However, it must be clear that the defendant's silence "is attributable to an invocation of his Fifth Amendment privilege or a reliance on *Miranda* warnings," as where the defendant refuses to say anything after being advised of his rights. *People v McReavy*, 436 Mich 197, 201, 217-218; 462 NW2d 1 (1990). When the defendant has not maintained silence, and has chosen to speak, the Court has refused to endorse a formalistic view of silence. *Id.* at 218. The *Rice* panel stated:

In the instant case, defendant waived his Fifth Amendment rights at the outset of each interrogation. In the first interview, defendant made some statements, stopped talking, and hung his head down, and then again responded to questioning. In the second interview, after waiving his rights, defendant merely looked down, nodded, and cried. There is no evidence of record that during either

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<sup>2</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

interview defendant verbally invoked his Fifth Amendment right to remain silent or stated that he did not care to answer any further questions, except when he requested a halt to the interview, which the officers granted. . . . Therefore, the officers' testimony concerning defendant's nonverbal conduct and silence was not improper commentary on constitutionally protected silence. [*Rice, supra* at 437 (citations omitted).]

Here, the record discloses that defendant waived his rights. After an initial lack of responsiveness, he made certain statements, and there is nothing in the record to suggest that defendant's initial silence was an invocation of his right to remain silent. There is no evidence that defendant invoked his Fifth Amendment rights or requested a halt to the questioning. And he denied the allegations, while freely attempting to explain, in innocent fashion, how the victim may have seen him naked on occasion, how she may have seen him watching pornography, and how she may have accidentally seen him masturbating. As in *Rice*, the evidence was not improper, nor was the prosecutor's commentary on it improper. Because the evidence was admissible, counsel was not ineffective for failing to object to its introduction. *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).<sup>3</sup>

Affirmed.

/s/ Jessica R. Cooper  
/s/ William B. Murphy  
/s/ Janet T. Neff

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<sup>3</sup> Outside of the constitutional context, to the extent that the evidence should not have been admitted and commented upon by the prosecutor under the rules of evidence and our Supreme Court's decision in *People v Hackett*, 460 Mich 202; 596 NW2d 107 (1999), regarding tacit admissions, we find that defendant has failed to show that, but for counsel's assumed error in failing to object, there was a reasonable probability that the result of the proceedings would have been different. See *Watkins, supra* at 30. The evidence of defendant's guilt was strong.